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No. 92-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 2, 1992
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QUESTIONS PRESENTED

1. Should the United States Supreme Court grant certiorari in this case, where the Second Circuit, in direct conflict with the Fifth Circuit's heightened pleading requirement for Monell civil rights claims, presently under review in this Court in Leatherman v. Tarrant Co. Narcotics Intelligence Unit, ___ U.S. ___, 60 USLW 3746 (June 22, 1992), held that plaintiff's complaint, although lacking specific allegations of inadequate training and supervision, should survive a motion to dismiss?

2. Can a complaint brought pursuant to 42 U.S.C. § 1983, alleging failure to train and supervise employees, survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure where the municipality has no control over the training and supervision policies and practices of the policymaker?

PARTIES

Petitioner, the defendant-appellee below, is the City of New York.

Respondent, the plaintiff-appellant below, is James Walker.

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THE CITY OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the City of New York, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 4, 1992, which reversed the decision and order of the United States District Court for the Southern District of New York (Martin, J.), dismissing plaintiff's suit brought pursuant to 42 U.S.C § 1983 for failure to state a claim upon which relief can be granted, and which remanded the case for further proceedings.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Second Circuit, entered September 4, 1992, and from which review is sought are reported at 974 F.2d 293 (2d Cir. 1992) and are reprinted in the Appendix beginning at page 1.

The Judgment and Memorandum Order and Opinion of the United States District Court for the Southern District of New York, entered January 15, 1992, from which respondent appealed, are not reported in the Federal Supplement reporters, but can be found at 1992 WL 8160 (S.D.N.Y.), and are reprinted in the Appendix beginning at page 25.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered Judgment, from which review is sought, on September 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The case also involves Rules 12 (b)(6) and 8(a) of the Federal Rules of Civil Procedure. The case further involves N.Y. Constit., art. XIII, § 13(a)(c); N.Y. Co. Law §§ 700, 926 (2), 930 (McKinney's 1972); and N.Y. Public Officers Law, § 2 (Mckinney's 1988). The statutes and rules are reprinted in the Appendix to this Petition beginning at page 36.

STATEMENT OF THE CASE

The plaintiff, John Walker, brought suit solely against the City of New York, pursuant to 42 U.S.C. § 1983 and New York State common law, alleging violations of his constitutional rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, during a criminal case in which he was prosecuted for and convicted of murder (A5-19).[1]

Plaintiff's Monell[2] claim against the City of New York alleged that the New York City Police Department ("NYPD") and the King's County District Attorney's Office ("DA's Office") had "grossly or recklessly or deliberately inadequate policies, procedures and regulations" regarding the safeguarding of citizens' constitutional rights in the areas of disclosing exculpatory evidence, offering and eliciting truthful testimony during criminal proceedings, and avoiding unjust convictions, and that the NYPD and DA's Office grossly, recklessly or deliberately failed to train and supervise their personnel in these particular areas (A16-17). Plaintiff further alleged that during the prosecution of his criminal case, exculpatory evidence was improperly withheld from him, and that a police officer, an assistant district attorney and a material witness committed perjury. Plaintiff claimed that as a result of the misconduct and the inadequate

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[1] Numerical references in parentheses preceded by the letter "A" refer to pages in the joint appendix filed in the Second Circuit Court of Appeals.

[2] Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

policies, procedures, training and supervision, his constitutional rights were violated, he was wrongfully convicted and he was improperly incarcerated for nineteen years (A16-17).

Defendant moved to dismiss the complaint on the ground that plaintiff had failed to state a claim upon which relief could be granted (A27-28). In lieu of responding to defendant's motion, plaintiff filed an amended complaint (A 29-56).

In addition to the Monell claims that he had already made, plaintiff now alleged that the NYPD lacked any written policies, procedures, or practice guides, and gave no training, or insufficient training, in how to handle exculpatory evidence, how to deal with improper conduct on the part of personnel in the DA's Office, and the duty to testify truthfully in criminal proceedings (A 43-45). Moreover, plaintiff alleged that the DA's Office lacked an adequate training program for new assistant district attorneys concerning their obligations to disclose exculpatory evidence and to avoid the introduction of perjured testimony in criminal proceedings; the office lacked any written policies, procedures or practice guides concerning these matters; and it failed to supervise and evaluate assistant district attorneys with respect to these matters, despite the high volume of cases that each attorney was required to handle (A45-47).

Plaintiff further alleged that both the Commissioner of the NYPD and the District Attorney had the authority to promulgate and implement policies and procedures in their respective offices, either themselves or through authorized delegates, and that the enumerated deficiencies were a

substantial factor in causing the violations of plaintiff's constitutional rights (A47-49).

Defendant moved to dismiss the amended complaint for the same reason and pursuant to the identical authority as set forth in its first motion (A60-61).

The District Court Opinion

In a memorandum endorsement entered on January 14, 1992, the United States District Court for the Southern District of New York (Martin, U.S.D.J.) dismissed plaintiff's federal claims with prejudice (25-33).[3]

While the Court recognized the general rule that at the pleading stage of a § 1983 action a plaintiff need only make a "'short and plain statement of the essential elements of his claim . . . [but] is not required to set out the facts in detail'", it went on to state that "what is an adequate 'short and plain statement' depends on the case at hand, and the type of claim" (27-28) (citations omitted). The Court found that in order to survive a motion to dismiss, a § 1983 Monell claim alleging failure to train and supervise must contain "'specific allegations indicating a deprivation of rights'" that go beyond conclusory allegations (27-28, including n.1,) (citations omitted).

Citing City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), the Court went on to state that a claim of lack of

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[3] Numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

training only rises to the level of municipal liability under § 1983 if it constitutes "deliberate indifference" to people's constitutional rights as evidenced by either an "obvious"need for training, or a pattern of constitutional violations that would put the municipality on notice that training was necessary (27).

Applying this standard to the claims against the DA's Office, the Court found that plaintiff had not alleged a pattern of constitutional violations involving either the use of perjured testimony or the mishandling of exculpatory evidence that would put the district attorney on notice that training was necessary, and that because of their legal education and preparation for the bar, it was not obvious that assistant district attorneys needed on-the-job training in these areas (27-28). The Court found plaintiff's allegations against the DA's Office insufficient under the pleading requirements for a § 1983 claim; therefore it dismissed them (28-29).

Applying this standard to plaintiff's claims against the NYPD, the Court found that because it was undisputed that the police officer had turned over all exculpatory evidence to the DA's Office, his obligations under Brady v. Maryland, 373 U.S. 83 (1963) had been fulfilled; therefore plaintiff failed to make out a policy and practice claim of failure to train or supervise police officers in their duty to disclose exculpatory evidence (30-31). The Court further found that plaintiff had not alleged a pattern of constitutional violations resulting from the NYPD's failure to train officers not to perjure themselves and not to attempt to convict innocent people, and it found that the need for training in these areas was not so obvious that the NYPD should have known that training was necessary (31-33). Accordingly, the

Court held that plaintiff's allegations against the NYPD were insufficient to withstand defendant's motion to dismiss (33).

The Opinion of the Second Circuit

On September 4, 1992, the United States Court of Appeals for the Second Circuit (Walker, C.J.), reversed the order and judgment of the District Court and remanded the matter for further proceedings (1-2).

The Court set forth three requirements for making out a claim against a municipality for failure to train or supervise its employees sufficient to constitute deliberate indifference to people's constitutional rights under a Canton analysis (10-12). The Court stated that a plaintiff must show that "a policymaker knows 'to a moral certainty' that her employees will confront a given situation; the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult, or that there is a history of employees mishandling the situation; [and] the wrong choice by the City employee will frequently cause the deprivation of a citizen's constitutional rights" (11-12) (citations omitted). The Court went on to state that a motion to dismiss the complaint should only be granted if, accepting plaintiff's factual allegations as true, and drawing all reasonable inferences in his favor, "'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (12) (citations omitted).

Applying this standard and test to plaintiff's allegation against the NYPD concerning exculpatory evidence, the Court affirmed the District Court's dismissal of the claim, because plaintiff alleged that the police had

disclosed all such evidence to the prosecutor and therefore had fulfilled its Brady obligations (13-16).

With respect to plaintiff's claim of perjury, the Court found that, although the NYPD knew to a moral certainty that officers would be confronted with opportunities to commit perjury, and that failure to resist such opportunities would almost certainly result in deprivations of constitutional rights, plaintiff's pleading of this claim was defective because it failed to allege either that it was likely that appropriate training would make the choice less difficult, or that there had been a pattern of perjury that should have put the NYPD on notice of the need for training in this area (16-17). Despite reaching this conclusion, the Court held that plaintiff should be permitted to pursue discovery in order to determine whether there was a practice of condoning perjury, or a pattern of police perjuring themselves sufficient to put the NYPD on notice that training and supervision was necessary in this area (17-18).

The Court went on to state that the same analysis and holding applied to plaintiff's claims against the DA's Office concerning perjury (18). Then, applying the same standard and test to plaintiff's claim concerning the disclosure of exculpatory evidence, the Court found that plaintiff had sufficiently stated a claim, because the district attorney knew to a moral certainty that his assistants would acquire Brady material; the failure to disclose such material would almost always lead to a substantial violation of constitutional rights; and, in 1971, only seven years after Brady had been decided, the standard enunciated therein was not so obvious or easy to apply so as not to require training and supervision (18-19).

Finally, the Second Circuit held that the district attorney is a municipal policymaker, for purposes of § 1983 liability in claims of failure to train or supervise (21). The Second Circuit based its decision on the distinction that it had created between activities involving the prosecutorial function, i.e., bringing indictments and conducting hearings and trials for which no Monell liability will lie, because under such circumstances the prosecutor is acting on behalf of the State, and activities involving administrative functions, i.e., disciplining, training and supervising office personnel, for which Monell liability will lie because, under such circumstances, the district attorney is classified as a county officer under New York State law (20-21). The Court found that because the City of New York had conceded that the district attorney has final discretionary authority to implement training and supervision policies in his county, and because, in New York City, the counties are subdivisions of the City, the Court found that defendant could be held liable in a § 1983 failure to train and supervise claim, notwithstanding the fact that no City official has any veto authority over the decisions of a district attorney (21).

The present Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT AMONG THE CIRCUITS AS TO THE DEGREE OF FACTUAL SPECIFICITY REQUIRED, IN PLEADING MONELL CLAIMS PURSUANT TO 42 U.S.C. § 1983, IN ORDER TO SURVIVE A MOTION TO DISMISS. BECAUSE OF THE INCREASING NUMBER OF SUCH CLAIMS BEING FILED NATIONWIDE, THIS IS AN IMPORTANT QUESTION FOR THE SUPREME COURT TO DECIDE.

The Supreme Court recently granted certiorari in Leatherman v. Tarrant Co. Narcotics Intelligence Unit, 954 F.2d 1054 (5th Cir. 1992), cert. granted, 60 USLW 3746, (June 22, 1992) on the very issue of whether a civil rights complaint against a local governmental entity, alleging constitutional violations caused by the entity's alleged failure to train and supervise its police officers, should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure when it fails to satisfy the Fifth Circuit's heightened pleading requirement, or whether the heightened pleading requirement is prohibited either by Rule 8 of the Federal Rules of Civil Procedure, or by the Rules Enabling Act contained in 28 U.S.C. § 2072(b), which provides that rules of practice and procedure shall not abridge, enlarge or modify any substantive right. As set forth below, the Second Circuit's liberal pleading requirement for Monell § 1983 claims alleging failure to train or supervise is inconsistent with the heightened pleading requirement applied by the Fifth Circuit in Leatherman, and presently under review in this Court. If this Court adopts the Fifth Circuit's heightened pleading

requirement, then the Second Circuit's decision must be vacated. If this Court does not resolve the heightened pleading issue raised in Leatherman, then the Court should grant plenary review in this case, in order to resolve this important issue.

In Leatherman v. Tarrant Co. Narcotics Intelligence Unit, supra, 954 F.2d at 1056, the plaintiff alleged that Tarrant County's Narcotics Intelligence Unit had failed to adequately train its officers in how to deal with domestic pets while executing search warrants, and that such failure amounted to a policy resulting in constitutional harm. The Fifth Circuit dismissed the complaint, holding that the plaintiff had not met that Circuit's heightened pleading requirement for Monell claims brought pursuant to 42 U.S.C. § 1983 Id. at 1058. The Fifth Circuit stated that in order to make out a claim for inadequate training, a plaintiff would have to demonstrate

> 'at least a pattern of similar incidents in which citizens were injured ... [in order] to establish the official policy requisite to municipal liability under section 1983.'... While plaintiff's complaint sets forth the facts concerning the police conduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training.

(Id.) (citations omitted) (emphasis added). In the alternative, a plaintiff would have to show that a single incident was caused by an existing unconstitutional municipal policy. Id.

The Seventh Circuit also has a heightened pleading requirement for such claims. In Rodgers v. Lincoln Towing Service, Inc., 771 F.2d, 194, 202 (7th Cir. 1985), where the plaintiff alleged that the Chicago Police Department had a policy of placing intimidating phone calls to criminal suspects, and that the Police Commissioner failed to properly train his employees and allowed a pattern of harassment and intimidation to continue, the Seventh Circuit affirmed the dismissal of the Monell claims, because the plaintiff had alleged no facts "that would indicate problems 'systemic in nature'" (citation omitted).

Thus, for Monell claims alleging failure to train and supervise, both the Fifth and Seventh Circuits require the pleading of specific facts to show a pattern of incidents or problems resulting in the deprivation of constitutional rights arising from the municipality's policy or practice of failure to provide any or adequate training and supervision in a particular area.

On the other hand, although the Second and Fourth Circuits require such pleadings to contain some facts going beyond stating mere legal conclusions, these Circuits reject the concept of a heightened pleading requirement, and instead subscribe to the dictates of Rule 8(a) of the Federal Rules of Civil Procedure requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief".

Thus, in Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123, 124 (2d Cir. 1991), where the plaintiff alleged that inadequate training and supervision of transit police officers -- as evidenced by three internal reports of

arrest practices and other alleged, conceded or adjudicated incidents of improper arrests -- constituted a municipal policy or practice which resulted in his wrongful arrest, the Second Circuit vacated the District Court's dismissal of the complaint for failure to state a claim, based upon its reading of the requirements of Rule 8(a) of the Federal Rules of Civil Procedure. The Second Circuit went on to quote the principle enunciated in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", and that this principle should be strictly applied, especially in civil rights complaints. Id. at 123. The only limitation that the Second Circuit placed on such pleadings was that they should not be "wholly conclusory". Id. at 124.

In the instant case, the Second Circuit also enunciated guidelines to be followed in pleading and proving Monell claims of failure to train and/or supervise. The Second Circuit stated that the plaintiff must show that the policymaker knows to a moral certainty that his/her employees will confront a given situation; that the situation will present the employee with a decision that training or supervision will make less difficult, or that the policymaker is aware of a pattern of misconduct or mishandling a given situation that puts him/her on notice that training is needed in a particular area; and that lack of training in an area will frequently result in the deprivation of constitutional rights (11-12).

The Fourth Circuit, like the Second Circuit, also has a liberal pleading rule for § 1983 Monell claims, and will reject claims only if they are framed solely as legal

conclusions. In Revene v. Charles County Commissioners, 882 F.2d 870, 874-875 (4th Cir. 1989) the Court reiterated the Conley v. Gibson rule, and held that under the liberal notice-pleading requirements of the Federal Rules of Civil Procedure, a civil rights plaintiff need not be held to strict fact-pleading requirements in order to survive a motion to dismiss; rather plaintiff need only assert some general supporting facts, beyond entirely legal conclusions, that suggest specific deficiencies in the training, or that the incident alleged was not unique, or that there was a practice or custom of comparable conduct which might be charged to the deliberate indifference of a municipal policymaker. In Revene, the Fourth Circuit affirmed the District Court's dismissal of plaintiff's Monell claims because the plaintiff had failed to allege any facts suggesting training deficiencies other than the facts of the single incident in which he was involved.

The Third Circuit, on the other hand, seems to have created a hybrid rule with respect to this type of Monell claim. In Freedman v. City of Allentown, Pennsylvania, 853 F.2d 1111, 1114 (3d Cir. 1988), the Court reiterated its rule that in order to survive a motion to dismiss, the complaint had to "'contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed plaintiffs'". It also stated, however, that if the lack of specificity was due to the fact that the required information was under the control of the defendant(s), then the complaint would survive while the plaintiff was permitted to conduct a "'reasonable amount of discovery to help [plaintiff] make the necessary showing to prove her case'" (citations omitted). In that case, the Third Circuit dismissed plaintiff's Monell claims as insufficient

where she had alleged, inter alia, that the City had a policy of not instituting any procedures or systems to effectively monitor detainees with suicidal tendencies, and had failed to appropriate the necessary funds to provide adequate training to police officers in the handling of mentally disturbed suspects. Id. at 1113, 1116-1117.[4]

Applying its guidelines for pleading Canton claims and the general pleading requirements set forth in Ricciuti to plaintiff's perjury claims against the NYPD and the DA's Office, the Second Circuit held that the claims should not be dismissed and plaintiff should be permitted to pursue discovery, despite the lack of any indication of an obvious need for training and absent any allegations demonstrating that a pattern of perjury existed in either of those two offices, because it did "not appear 'beyond doubt' that

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[4] The split among the Circuits on the pleadings issue is even greater when one goes beyond Monell claims of failure to train and supervise, to consider Monell claims, in general, alleged under 42 U.S.C. § 1983. In addition to the heightened, liberal, and hybrid pleadings requirements described, above, the Ninth Circuit has completely rejected any requirement that a § 1983 plaintiff plead specific facts, finding that a complaint will sustain a motion to dismiss even if it contains "nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice". Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986). See also Evans v. McKay 869 F.2d 1341, 1349 (9th Cir. 1989); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988).

Walker [could] not prove this 'set of facts in support of his claim which would entitle him to relief'" (16-18). Under the Fifth Circuit's heightened pleading requirement, however, these claims would be dismissed, because plaintiff failed to allege either a pattern of similar incidents of perjury or any other facts indicating that the need for training and supervision in this area was obvious. See Leatherman v. Tarrant Co. Narcotics Intelligence Unit, supra, 954 F.2d at 1058.

Applying the same guidelines and pleadings rule to plaintiff's claim that the DA's Office had failed to adequately train and supervise its assistant district attorneys in how to handle exculpatory evidence, the Second Circuit held that this claim also should not be dismissed (18-19). Although plaintiff had not pled any facts showing a pattern of assistant district attorneys mishandling exculpatory evidence, and although he had not pled that the requirements of Brady v. Maryland, supra, were sufficiently new and unclear as to require training, the Court, sua sponte, found that "[b]ecause the proper course of conduct was not at all obvious in 1971 absent some training in the intricacies of Brady, a jury could find that the complete failure to train or supervise alleged here would likely result in ADAs making the wrong choices about turning over this kind of Brady material "(19).[5]

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[5] The Second Circuit affirmed the District Court's dismissal of plaintiff's claim against the NYPD for failure to train or supervise it officers on how to handle exculpatory evidence, because the police officer had turned this material over to the DA'S Office (14-16).

Given the increasing number of Monell failure to train and supervise claims, and the split among the Circuits as to what type of factual specificity is required to survive a motion to dismiss, it is extremely important that the Supreme Court resolve the issue of whether a plaintiff's pleading of a Canton claim must meet a heightened pleading standard.

II. THE SECOND CIRCUIT'S DECISION THAT THE CITY OF NEW YORK CAN BE HELD LIABLE FOR THE TRAINING AND SUPERVISION POLICIES AND PRACTICES OF THE DA'S OFFICE, BUT NOT FOR ITS DECISIONS TO PROSECUTE, DESPITE THE FACT THAT THE CITY HAS NO CONTROL WHATSOEVER OVER ANY OF THE DECISIONS OF THAT POLICYMAKER, DIRECTLY CONTRAVENES THE MANDATE AND SPIRIT OF MONELL AND ITS PROGENY.

Despite the wealth of New York State law that indicates that the DA's Office is an independent entity over which New York City has no control or influence, the Second Circuit draws a distinction, for purposes of Monell liability, between the administrative and prosecutorial functions exercised by district attorneys (20, quoting Gentile v. County of Suffolk, 926 F.2d 142, 152 n.5 (2d Cir. 1991)). Thus, while the Second Circuit recognizes that the City cannot be held liable under Monell for the prosecutorial actions exercised by members of the DA's Office, such as bringing indictments or conducting criminal trials, the Second Circuit has carved out an exception to this rule and

has found that municipal liability will lie in instances where the DA's Office trains and supervises its staff to carry out those very same prosecutorial functions (20). The exception is untenable, because the training and supervision of assistant district attorneys is integrally related to how they must handle their prosecutorial responsibilities.

The hallmark of the Supreme Court's decision in Monell is that a municipality can only be held liable for the constitutional injuries suffered by its citizens when the municipality itself acts through an official with policymaking authority, by either ordering or condoning policies or practices that result in the deprivation of constitutional rights. Monell v. New York Department of Social Services, supra, 436 U.S. at 690-694. See also Pembaur v. City of Cincinnati, 475 U.S. 469, 477-479 (1986). The Supreme Court has also made clear that the issue of who can be considered an official municipal policymaker is a question of state law. Id. at 483. Accord, City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988) (opinion of O'Connor, J.); id. at 143 (Brennan, J. concurring).

The Second Circuit's decision that the City of New York can be held liable for the training and supervision policies and practices of the DA'S Office contravenes both the mandate and spirit of these Supreme Court decisions, because the City has no control over and no input into how the district attorney runs his office, including decisions of what cases to prosecute, how to prosecute them, and how to manage the daily operations of the office. The Second Circuit's distinction between the training functions, where it would hold the City liable for the actions of the DA's Office, and the more traditional prosecutorial functions, where it

would deny liability, is an irrational one, having no relation to concepts of Monell liability.

Although the King's County District Attorney is indisputably a policymaker for his office, under New York State law New York City does not and cannot control, influence, or interfere with his decisions on how to train and supervise his staff in the handling of exculpatory evidence and perjury by witnesses during criminal proceedings. Accordingly, the Second Circuit misinterpreted New York State law when it held that New York City could be held liable, in a § 1983 Monell claim, for the DA's Office alleged failure to train and supervise its staff in these areas.

Under New York State law, the district attorney is a constitutional officer, chosen by the electors of each county (N.Y. Constit., art. XIII, §13[a]), charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected...". N.Y. Co. Law, § 700 (McKinney's 1972). It is the district attorney alone who is responsible for appointing and removing assistant district attorneys in his/her office. N.Y. Co. Law, § 930 (McKinney's 1972). Moreover it is only the governor of the State who may remove a district attorney (N.Y. Const., art. XIII § 13 [a]), or who may appoint a replacement if there is a mid-term vacancy in the office. N.Y. Co. Law § 926(2) (McKinney's 1972).

Thus, although New York State law home rule provisions classify district attorneys as county rather than state officers -- see, e.g., Kelley v. McGee, 57 N.Y.2d 522, 534, 443 N.E.2d 908, 913, 457 N.Y.S.2d 434, 438 (1982);

Fisher v. State of New York, 10 N.Y.2d 60, 176 N.E.2d 72, 217 N.Y.S.2d 52 (1969); N.Y. Public Officers Law § 2 (McKinney's 1988) -- and although in New York City the five counties are geographical subdivisions of the City, New York law is clear that its cities cannot be held liable for the decisions and conduct of members of the DA's Office in the furtherance of their duties as prosecutors. See Brown v. City of New York, 60 N.Y.2d 897, 898, 458 N.E.2d 1250, 1251, 470 N.Y.S.2d 573, 574 (1983) (where plaintiff sued the City for, inter alia, malicious prosecution, and moved for summary judgment, the Court held that it was error to apply the doctrine of issue preclusion to the civil case based on issues decided in the criminal case, because the City and the district attorney's office are separate entities and do not stand in sufficient relation to establish the key element of identity of the parties); Lee v. City of Mt. Vernon, 49 N.Y.2d 1041, 1043, 407 N.E.2d 404, 429 N.Y.S.2d 557, 558 (1980) (in suit against the city and various individuals for malicious prosecution, the Court of Appeals stated that "the decision [whether] to present the matter to the Grand Jury was that of the District Attorney, for whose acts the City is not responsible ...") (emphasis added); Whitmore v. City of New York, 80 A.D.2d 638, 640, 436 N.Y.S.2d 323, 325 (2d Dept., 1981), appeal dismissed, 54 N.Y.2d 603 (1981) (where plaintiff sued the City, inter alia, for malicious prosecution, Court cited Lee v. City of Mt. Vernon, supra, for the proposition that the City would not be responsible for prosecutor's misconduct); Morris v. City of New York, NYLJ, Jan. 1, 1992, at 24, col. 3 (Sup. Ct., N.Y. Co.) (where plaintiff sued the City for torts allegedly committed by an assistant district attorney the Court, citing Zimmerman v. City of New York, infra, held that New York City could not be held liable for conduct by members

of the New York County District Attorney's Office, even though the district attorney is classified as a local officer under the Public Officers Law and is paid by the City, because the City has no power to control the manner in which the district attorney performs his prosecutorial duties); Zimmerman v. City of New York, 52 Misc.2d 797, 800, 801, 276 N.Y.S.2d 711, 716 (Sup. Ct., N.Y. Co., 1966) (City does not have the power to direct the district attorney or to control the manner in which he performs his duties; therefore, even if statutes give the county the power to control issues of salary and budget, and even if he is classified as a local rather than a state officer, he is not a local officer for purposes of liability). Indeed, although New York City has the authority to abolish the offices of most county officials, it has no such authority with respect to the District Attorney's Office. N.Y. Const., art. 13 § 13(c).

Accordingly, because the City of New York had no control and no influence over the decisions by the DA's Office as to how to train and supervise its staff in the areas of how to handle exculpatory evidence and how to respond to suspected perjury during criminal proceedings, petitioner respectfully prays that this Court grant plenary review of this issue, in order to correct the Second Circuit's misapplication of the principles and mandate of Monell and its progeny.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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